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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN KADISH, ANITA KADISH, and
2 DREAMS, LLC, an Indiana Limited
Liability Company,

Appellants-Petitioners,

VS.

No. 64A04-0612-CV-691

PLAN COMMISSION OF PORTER COUNTY,

Appellee-Respondent.

APPEAL FROM THE PORTER SUPERIOR COURT

The Honorable Mary R. Harper, Judge
Cause No. 64D05-0510-PL-8923

May 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellants-petitioners Anita and John Kadish (collectively, the Kadishes), and 2

Dreams, LLC, an Indiana Limited Liability Company (2 Dreams), appeal from the trial court's judgment in favor of appellee-respondent Plan Commission of Porter County (Plan Commission). Specifically, the Kadishes maintain that the trial court's judgment affirming the Plan Commission's decision denying their application for a plat approval with regard to certain real property that they sought to develop as a subdivision was error because the evidence demonstrated that the requirements under the county's Open Space Ordinance¹ and the regulations regarding septic system placement had been met. Finding no error, we affirm the judgment of the trial court.

FACTS

The Kadishes and Ronald and Susan Stangebye are the owners of an eighteen-acre parcel of land in Westville, which is commonly known as 940 North County Line Road (the real estate). The Kadishes and the Stangebys also formed 2 Dreams for the purpose of developing the real estate and creating eight separate residential lots. Sometime in 2005, the Kadishes filed an application with the Plan Commission seeking primary plat approval for the real estate, which was to be known as the Huntington Chase Subdivision (Huntington Chase).

Prior to the commencement of a public hearing on the application, the Kadishes met with the Porter County Technical Advisory Committee (TAC) on July 22, 2005, July 29, 2005, and August 19, 2005, and TAC members reviewed the Kadishes' request for approval. The Kadishes also secured and filed a soil description report that was prepared by John J.

¹ In general, this ordinance provides that developers of residential subdivisions are required to provide "open space" that will preserve the beauty, value, and integrity of the land. Specific provisions of the ordinance are

McQuestion, a certified professional soil scientist. McQuestion was employed by Soil Solutions, a soil and environmental consulting company. The report was filed with the Porter County Health Department (Health Department) for review. Kelly Cadwell, an environmental health specialist who was employed by the Health Department, reviewed the report that McQuestion had prepared. On July 28, 2005, Cadwell issued a subdivision approval letter that detailed the specific requirements for a septic permit as to each of the eight lots in the subdivision.

During a meeting on August 19, 2005, the TAC members unanimously voted to forward the primary plat for Huntington Chase to the Plan Commission for further action with a favorable recommendation subject to conditions that the Kadishes were to incorporate into the primary plat. The report to the Plan Commission outlined basic details of the proposed plat, including various environmental features such as a flood plain, a forest area, and wetlands. The report also stated that 20% of the parcel was dedicated to preserving the wetlands and the majority of the forest area and that the remainder of the forest area was protected by a conservation easement. It was also noted that the proposed drainage system had been accepted by the Porter County Drainage Board and that the lots had been approved for septic systems by the Health Department.

At the public meeting on September 14, 2005, the Plan Commission members expressed concern as to whether the proposed plat would be able to support the use of septic systems. In essence, the evidence established that the real estate contained limitations for

discussed infra.

buildings and septic fields. One of the adjoining landowners testified that the proposed drainage plan proposed a “water release rate” well below that required by Porter County standards. Ex. F, Appellants’ App. p. 193. The landowner also testified that the proposed drainage system would reduce offsite water flow by 19%. Additionally, one Plan Commission member observed that an approval by the Health Department “didn’t mean anything” because that agency does not “measure and they don’t know where the water table is.” Ex. F. The Plan Commission heard additional concerns about the septic system and, at the close of the meeting, the Kadishes’ request for primary plat approval was denied by a vote of 7-2. On September 28, 2005, the Plan Commission specifically found that

[1] [The] proposal does not correspond with the master plan in that it is currently in an outlying area, and not within an “urban fringe” and does not have public utilities of sewer and water available.

[2] Petitioners presented evidence that the proposed detention pond would gather storm water not only from the subdivision, but also detain off-site water flow and would benefit downstream properties. However, there was also evidence presented that there are drainage problems resulting from Laporte County, and a drainage ditch that has been filled in.

[3] There are considerable wetlands and timber features on this property. The open space dedication would be 26%. However, no determination was made as to the precise amount of features that were required to be preserved under the open space ordinance.

[4] The biggest area of difficulty with this proposal has to do with soil problems. The report [from] Soil Solutions indicates that there are a number of soils on this property of types unsuitable for both septic fields and for building stability. Some of the soils are listed as having [severe] limitations as to suitability for septic fields. The report [from] the Board of Health indicates that many of the lots would require mound or flood type septic systems. The Commission finds that there are insufficient calculations and a lack of other soil boring evidence to support the placement of sufficient septic fields, based on the proposed size of the lots.

[5] The Plan Commission further finds that it is against the interests of public health, safety and welfare to allow buildings and septic fields in soils of this quality unless the petitioner can provide specific evidence that each proposed lot can support same, and that the calculations exclude unsuitable soils.

Appellants' App. p. 121-22.

On October 14, 2005, the Kadishes filed a petition for writ of certiorari in the trial court for a review of the Plan Commission's decision. Following the parties' argument on the petition on June 12, 2006, the trial court issued an order dismissing the Kadishes' petition.

The trial court initially determined that findings one, two, and five were not sufficient to support the Plan Commission's ruling. In particular, the trial court determined that "while the Planning Commission's finding that the Petitioner's proposed plat does not conform to the Porter County Master Plan is supported by the evidence, such a finding is not sufficient grounds upon which to deny primary plat approval." Id. at 196-97. With regard to the drainage issues discussed in finding two, the trial court found that "the record before the Court indicates that that the proposed drainage plan will not only sufficiently handle the drainage for the proposed subdivision under the standards of the ordinance, but it will also reduce the current rate of runoff." Id. at 197. The trial court further noted that the Plan Commission's ruling could not be upheld because "the county drainage board has approved the subdivision's drainage system as a regulated drain, as is required under . . . the Porter County subdivision control ordinance." Id. In essence, the trial court observed that it "was not presented with significant evidence that the proposed subdivision poses a risk of

increased flooding or drainage problems.” Id.

The trial court also determined that the Plan Commission’s decision to deny the plat approval on the grounds that the plan “may have an adverse [e]ffect on ‘public health, safety and welfare’” was erroneous because such language is not considered a “concrete standard,” and there were “no specific standards by which a proposed plat may be judged.” Id. at 201. The trial court observed that the language of the subdivision control ordinance may not be sufficiently specific “to put applicants on notice of what will be considered upon application for primary approval.” Id. at 202.

However, the trial court upheld the Plan Commission’s decision to deny the Kadishes’ application based on findings three and four. The trial court determined that nothing in the record pointed to a specific finding as to the exact percentage that should be reserved under the open space requirement. In other words, the trial court observed that there were no specific references in the Kadishes’ application regarding the precise portion of land that should be designated as open space, or whether the proposed plan met the ordinance requirements. Hence, the trial court found that the evidence supported the Plan Commission’s conclusion that the Kadishes failed to satisfy the requirements under the ordinance in order to obtain plat approval. As a result, the trial court declined to disturb the Plan Commission’s decision.

The trial court also determined that the Plan Commission’s conclusion that there was insufficient evidence to support the placement of adequate septic fields was correct. Specifically, the trial court noted that, in light of the evidence that was presented at the public

hearing, the Plan Commission was not satisfied with the specifics of the water table calculations—especially for a site that contained such severe soil limitations. As a result, the trial court stated that it would not reweigh the evidence, noting that there was a reasonable evidentiary basis for the Plan Commission’s conclusion that the calculations were not sufficient to support a safe placement of the recommended septic fields on the property.

On August 30, 2006, the Kadishes filed a motion to correct error, claiming that:

- 8.1 The Court erred in upholding the Plan Commission’s finding that no determination was made as to precise amount of features that were required to be preserved under the Open Space Ordinance.
- 8.2 The Court erred in upholding the Plan Commission’s finding that there [were] insufficient calculations and evidence to support the placement of sufficient septic fields, based on the proposed size of the lots.
- 8.3 The Court erred in dismissing Petitioners’ Verified Petition of Writ of Certiorari and failing to mandate that the Plan Commission approve Petitioners’ primary plat of Huntington Chase Subdivision.

Appellants’ App. p. 206. The trial court denied the motion to correct error, and the Kadishes now appeal.

DISCUSSION AND DECISION

I. Standard of Review

In accordance with Indiana Code section 36-7-4-1016, a Plan Commission’s decision approving or denying a subdivision plat “may be reviewed by certiorari procedure in the same manner as that provided for the appeal of a decision of the board of Zoning appeals.” Area Plan Comm’n of Evansville-Vanderburgh County v. Hatfield, 820 N.E.2d 696, 698 (Ind. Ct. App. 2005). The trial court has the authority to mandate the county plan

commission to approve the developer's primary plat so long as it conformed to concrete standards set forth in county ordinances. Johnson County Plan Comm'n v. RamsHead Corp., 463 N.E.2d 295, 303-04 (Ind. Ct. App. 1984).

We also note that when an aggrieved party seeks relief in a trial court from an adverse administrative determination and attacks the evidentiary support of the board's findings, he or she bears the burden of demonstrating that the agency's conclusions are clearly erroneous. Town of Beverly Shores v. Bagnall, 590 N.E.2d 1059, 1061 (Ind. 1992). Put another way, an agency decision will not be overturned unless the evidence, when viewed as a whole, demonstrates that the conclusions are clearly erroneous, meaning that the record lacks any facts or reasonable inferences supporting them. Id. at 1059. We presume that the commission's decision was correct and we will not overturn that decision unless it is arbitrary, capricious, or an abuse of discretion. Cundiff v. Schmitt Dev. Co., 649 N.E.2d 1063, 1066 (Ind. Ct. App. 1995). A decision is arbitrary, capricious, or an abuse of discretion if it is not supported by substantial evidence. Rice v. Allen County Plan Comm'n, 852 N.E.2d 591, 597 (Ind. Ct. App. 2006), trans. denied.

Finally, we note that to the extent that the trial court's findings are based on a paper record, this court conducts its own de novo review of the record. Plan Comm'n of Floyd County v. Klein, 765 N.E.2d 632, 641 (Ind. Ct. App. 2002). On the other hand, if the trial court holds an evidentiary hearing in connection with an appeal from an administrative agency, we defer to the trial court to the extent that its factual findings derive from the hearing. Id. The commission's decision will be sustained if it was correct on any grounds

stated for disapproval. Van Vactor Farms v. Marshall County Plan Comm’n., 793 N.E.2d 1136, 1142 (Ind. Ct. App. 2003).

II. The Kadishes’ Claims

The Kadishes argue that the trial court erred in denying their writ of certiorari because the evidence presented to the Plan Commission at the public hearing established that the requirements of Porter County’s Open Space Ordinance had been satisfied. The Kadishes also maintain that their primary plat should have been accepted because the Health Department had approved the proposed septic systems. In essence, the Kadishes argue that reversal is warranted because they showed that the Plan Commission’s decision to deny the application for primary plat approval was arbitrary, an abuse of discretion, and not based on the evidence presented.

We initially observe that section 17.108.010 of Porter County’s Open Space Ordinance provides that residential subdivisions “shall be required to provide open space . . .to preserve important site amenities and environmentally sensitive areas.” This section further provides that the intent of the ordinance is to:

- A. Encourage the wise use and management of natural resources;
- B. To preserve the integrity, stability, beauty and value of the land;
- C. Preserve the natural beauty of the County and insure appropriate development with regard to environmental features; and
- D. To provide active or passive recreational opportunities for the residents within a proposed development.

Section 17.108.050(A)(2) sets forth various requirements for residential subdivisions. Specifically, the relevant portions provide that:

- a. Minimum Open Space. Sites that have one (1) or more existing environmental features and/or unbuildable land shall reserve a minimum of 20% of the site for open space.
- b. Designated Priority Areas. Sites that have existing environmental features shall preserve 100% of the designated priority areas for open space.
 - i. If the area of the designated priority areas alone exceeds 20% of the total site area, the site qualifies to utilize the intensity bonus.
 - ii. Exception if the area of the designated priority areas alone exceeds 40% of the total site area, the developer shall not be required to preserve priority areas greater than 40% of the total site area.

(Emphasis added). Finally, section 17.108.060 (F)(C) of the ordinance states that

Lands or portions of lands that the Plan Commission finds to be unsuitable for development due to flooding, improper drainage, . . . or other reason or feature that may be harmful to the health, safety and general welfare of the present or future inhabitants of the development shall not be subdivided or developed unless adequate and environmentally appropriate provisions are made by the developer and approved by the Plan Commission to remedy and/or control the problems created by the unsuitable conditions. If the conditions cannot be remedied, those lands, or portions of lands, shall be set aside and allowed to remain open space.

As noted above, the Plan Commission rejected the statements of the Kadishes and members of the TAC at the public hearing that the open space requirements of the ordinance had been satisfied. The evidence showed that significant environmental features existed on the real estate, including wetlands and timber regions. Appellants' App. p. 44-45, 69, 198. Moreover, the determination as to the exact percentage to be reserved under the open space requirement was also at issue. Indeed, the only reference to environmental features was made at the TAC meeting when the Kadishes indicated that 3.62 acres were involved. Id. at 94, 102. In light of the plain language of the ordinance, the Kadishes could not simply

assume that only 20% of the land set aside for open space would assure compliance with the requirements of the ordinance. Instead, the precise location and acreage of all environmental features as defined in the ordinance had to be shown, as well as any acreage that might otherwise be unsuitable for building. As the Plan Commission observed, the Kadishes provided no delineation or specific acreage requirements. In essence, the Plan Commission was not required to accept the conclusory statements made by the Kadishes or the TAC that the open space requirements had been satisfied. Thus, the trial court did not err in affirming the Plan Commission's decision that the Kadishes had failed to show the precise amount of the features on the land that were to be preserved pursuant to the open space requirement.

The Kadishes also claim that the trial court erred in denying the writ of certiorari because the evidence before the Plan Commission clearly established that the Kadishes had complied with all of the soil conditions and septic system requirements set forth in the ordinance.

Under section 16.16.010(B)(4) of the ordinance:

Any primary subdivision proposing to utilize a subsurface absorption field for a septic system shall be reviewed by the county health department. The developer's registered engineer or registered land surveyor shall review the method of resolving the inherent soil problems.

Id. at 132. Also, section 16.16.020(D)(1) of the ordinance provides that

If the developer does not propose to connect to a sewer or water supply system, then a statement on the feasibility of a connection shall be made, including distance from the nearest water and utility lines.

Id. at 134.

Although the Kadishes acknowledge that the soil reports and the Health Department report are required to be submitted with the primary plat, appellants' br. p.10-11, they argue that the Plan Commission was required to approve their application as to the issues that related to septic systems on the property. In other words, the Kadishes maintain that because all of the lots were initially "approved" by the Health Department, the Plan Commission merely had a ministerial duty to issue a final approval. Id. at 10-11. However, none of the ordinance provisions support a conclusion that initial Health Department approval of the use of a septic system on the real estate barred the Plan Commission from denying a primary plat approval. Indeed, it is apparent that the Health Department simply determines what type of system, if any, may be used on the property when considering the soil conditions. And, in light of the evidence that was presented with regard to the significant soil and water table issues on the property that might preclude construction on the real estate, the Plan Commission could conclude that the Kadishes failed to comply with all of the conditions set forth in the ordinance. Indeed, even the Health Department's report indicated that many of the lots would require flood-type septic systems, and the Kadishes failed to include this determination in their proposal. Appellants' App. p. 141. The Plan Commission did not ban the subdivision because of the use of septic systems in general, it merely determined that the Kadishes failed to offer sufficient evidence to show that their proposed drainage plan on the lots would comply with the relevant ordinance provisions as well as other applicable state laws and regulations. In short, the Kadishes failed to offer specific evidence to support a determination that each lot could support a septic system. As a result, we conclude that the

trial court properly denied the Kadishes' writ of certiorari, and the Plan Commission's decision stands.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.